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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-385

JOSEPH J. MAGGIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court failed to comply both with Rule 11 of the Federal Rules of Criminal Procedure and with a mandate of the Fifth Circuit (in *Bryan* v. *United States*, 492 F. 2d 775, certiorari denied, 419 U.S. 1079) in accepting his guilty plea, and that his plea was made without full knowledge of the consequences.

An indictment filed in September 1972, in the United States District Court for the Middle District

of Alabama, charged petitioner and several co-defendants with conspiracy to commit mail fraud, in violation of 18 U.S.C. 371, and with seven different instances of mail fraud, in violation of 18 U.S.C. 1341. Following a jury trial, petitioner was convicted on all counts and sentenced to imprisonment for three years. Petitioner appealed and his conviction was reversed and remanded because certain records had been admitted without proper authentication (Pet. App. 2-3). See *United States* v. *Blake*, 488 F. 2d 101 (C.A. 5).

On the date set for retrial, petitioner moved to change his plea to guilty on one of the mail fraud counts (H. 1).[1] The district court, which had heard the earlier trial, ascertained that a bargain had been struck between the government and the defendant in which the change of plea was made in return for the dismissal of the remaining counts (H. 2). The court asked petitioner and his counsel whether they were aware of any other agreements; both replied, "No, sir" (H. 2). Upon further inquiry of petitioner, the court ascertained that he had received no threats or promises, other than the agreement to dismiss the seven counts, to induce him to plead guilty; that no one had stated what his sentence would be; and that he was aware of the maximum punishment that could be imposed (H. 2).

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[1] "H." refers to the transcript of the May 13, 1974, Rule 11 hearing. "Tr." refers to the transcript of the hearing on petitioner's motion to withdraw his guilty plea. We are lodging both transcripts with the Clerk of this Court.

The court then accepted the plea and approved the government's motion to dismiss the remaining counts. Upon request of defense counsel, the court agreed to impose sentence later that day, so as to save petitioner and his lawyer the expense of another trip from their residences in Chicago, Illinois. (H. 2-3).

At the sentencing hearing government counsel made no statements. Defense counsel urged the court to place petitioner on probation. After petitioner stated that he had nothing to add to his attorney's remarks, the court sentenced him to imprisonment for two years (H. 3).

A week later petitioner filed with the sentencing court a motion to withdraw his guilty plea, alleging that the plea was not knowingly made and that the court had failed to comply with the requirements of Fed. R. Crim. P. 11, and with the procedures adopted by the Fifth Circuit a month earlier in *Bryan* v. *United States, supra* (Pet. App. 8). At a hearing on the motion at which petitioner, his counsel (Mr. Walsh), and government counsel testified, the evidence showed that during the initial conversations between Walsh and Assistant United States Attorney D. Broward Segrest regarding the possibility of a plea bargain, the latter had agreed, in exchange for a plea of guilty on one count, to dismiss the seven remaining counts and to recommend a sentence of probation if the court would allow him to make a recommendation. Segrest further indicated, however, that the court's policy was neither to ask for nor to

accept sentence recommendations from the government. Segrest stated that if he informed the probation office that the government would recommend probation, this suggestion possibly would be included in the presentence report to the judge (Tr. 60-65).

Five days before the trial date petitioner, after being informed of the negotiations between his counsel and the prosecutor, told his counsel that he would plead guilty only if Segrest were allowed to make a probation recommendation in open court (Tr. 20-21). Walsh conveyed this to Segrest, who requested the judge to make an exception in this case and accept a recommendation as to sentence. The judge refused (Tr. 8-9).

Segrest so informed Walsh, who relayed the information to petitioner. Petitioner responded that a trial would be necessary, but the following day, without further consultation with his counsel, he changed his mind. Petitioner stated that his decision was prompted by the prosecutor's cordial attitude and the feeling that if he received a three-year sentence upon conviction on eight counts, he would get a much lighter sentence, perhaps up to four months' imprisonment, for only one count (Tr. 28, 34-35, 37-38, 50-51).

After petitioner's guilty plea had been entered, but before he was sentenced, Segrest delivered a telegram to the district judge from an Assistant United States Attorney in Chicago, recommending probation because petitioner had provided assistance to the government which had resulted in a number of convic-

tions. The court told Segrest that it would not accept the telegram or place any reliance upon it at that time, and attempted to verify its message. After he left the judge's chambers, Segrest saw petitioner and made a comment to the effect that "things look good" (Tr. 28, 70). Petitioner said this reinforced his belief that he would receive lenient treatment.

After the hearing, the district court denied relief;[2] the court of appeals affirmed (Pet. App. A; 514 F. 2d 80).

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[2] The district court made the following findings and conclusions (Tr. 107-111):

a. The parties had not bargained for a recommendation by the government of a probated sentence in exchange for the guilty plea.

b. Petitioner's expectation of probation was the product of his own mental processes and not the result of any representations by his counsel or the prosecutor.

c. The plea-taking procedures were not in violation of Rule 11 since the court addressed petitioner personally and did ascertain that the plea was voluntarily made with an understanding of the charge and the consequences of the plea.

d. Petitioner in fact knew the nature of the charges and the elements of the offense by virtue of the earlier trial.

e. The factual basis requirement of Rule 11 was satisfied by examining the matter contained in the presentence report and by the fact that the court had presided at petitioner's first trial, where the testimony adduced was sufficient to convict him on all eight counts.

f. The noncompliance with *Bryan*, by failing to place petitioner under oath while questioning him before accepting the guilty plea, did not constitute a basis for setting the plea aside.

1. Petitioner contends that the dis[t court failed to comply with Rule 11 in accepti[is plea. His argument is essentially that the cou[lid not determine that petitioner knew the natu[f the charge because there was no discussion of[elements of the offense before the plea was acce[. This Court, in *McCarthy* v. *United States*, 394[S. 459, ruled that district judges accepting guilt[eas must follow the Rule and that noncomplian[would require vacation of a guilty plea. The Co[however, did not establish any precise formula f[a Rule 11 inquiry, but stated that "[m]atters o[ality, and not mere ritual, should be controlling." [*arthy, supra*, 394 U.S. at 467-468, n. 20 (quoti[rom *Kennedy* v. *United States*, 397 F. 2d 16, 17[. 6)).

As the court of appeals held, the [rd here shows that the district court addressed pet[ner personally and made the required determinati[that the plea had been made voluntarily with the[lerstanding of the nature of the charge and the co[quences of the plea (Pet. App. 6, 10-12). The di[t judge, who had presided at petitioner's first t[was not required by *McCarthy* to follow a [ualistic procedure" (Pet. App. 12) to ascertain [ioner's knowledge of the elements of the offens[to determine the existence of a factual basis f[he plea. The petitioner had been present and r[sented by the same counsel at the previous tria[There, all the government's evidence was present[n the charge upon which petitioner entered a gu[plea (as well as the seven additional counts).

When petitioner told the court that he concurred in counsel's motion to withdraw his plea of not guilty and to plead guilty to count one, the limited inquiry, in the context of this situation, satisfied the requirements of *McCarthy* and of Rule 11.[3] As the court of appeals concluded (Pet. App. 12):

> At the plea taking session the district judge had personal knowledge of the previous trial, [petitioner's] presence at that trial, and the jury's conclusion that [petitioner] was guilty of the count to which the plea was directed. Under such a circumstance, the district court was justified in determining that [petitioner] understood the nature of the charge, without going through a ritualistic procedure that is necessary in the average case.
>
> The same circumstances fulfilled the requirement that the court "be satisfied that there is a factual basis for the plea," which is another requirement of Rule 11. *See, e.g.*, Jiminez v. United States, 487 F.2d 212 (5th Cir. 1973), cert. denied, 416 U.S. 916, 94 S.Ct. 1623, 40 L.Ed.2d 118 (1974).

2. Petitioner's remaining claims are also without merit. His contention that the court of appeals impermissibly excused the district court's failure to comply with plea-taking rules recently set forth by

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[3] As petitioner indicates (Pet. 2-3), Rule 11 has been amended so that in the future district judges, when addressing defendants seeking to plead guilty, will be required specifically to inform them of the nature of the charge to which the plea is offered. Rule 11(c)(1). The issue raised here accordingly is not important for the future.

the Fifth Circuit in the exercise of its supervisory powers presents no issue warranting review by this Court. As the court of appeals observed, petitioner was not prejudiced by the district court's failure strictly to comply with those procedures because they were designed principally to meet a problem not presented in petitioner's case (Pet. App. 22-23):

> We see no prejudice requiring reversal, however, from the district court's failure to comply fully with the *Bryan* mandate. The *Bryan* requirement that a defendant be placed under oath was to preclude collateral attacks on a guilty plea by a defendant asserting that his representations to the court when he entered the plea were fabricated. Here the facts uncovered at the subsequent hearing on [petitioner's] motion to vacate his plea did not contradict or discredit his statements made at the time he entered his plea. On the contrary those facts demonstrated the the agreement disclosed to the court was the only agreement and that it was fully consummated by the Government. While the district court did not state that plea agreements were acceptable, it did inquire into the existence of any plea agreement. [Petitioner] then accurately apprised the court of the existence and terms of the only such agreement.[4]

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[4] Petitioner's statement that he could not have been aware of *Bryan* at the time his plea was entered "because it had not yet been published" (Pet. 14) is inaccurate. The opinion in *Bryan*, filed on April 4, 1974, appeared in the April 29, 1974, issue of the Federal Reporter, Second Series, advance sheets. Petitioner's plea was not entered until May 13, 1974.

Petitioner contends finally that he did not understand the consequences of his plea because he expected that the sentence actually imposed would not exceed four months' imprisonment. But petitioner never repudiated his statement made to the district court at the time the plea was entered, *i.e.*, that he was aware of the maximum penalty and had not been promised a specific sentence by "anyone" in exchange for his plea. The prison term imposed after the plea was one-third less than that ordered after the jury trial. That this reduction did not meet petitioner's expectations did not make his plea any less knowing and voluntary. It has long been held, as the court of appeals recognized, that disappointment in the sentence imposed where the basis for defendant's disappointment is a subjective hope "unsupported by any promises from the Government or indications from the court, is insufficient to invalidate a guilty plea as unknowing or involuntary" (Pet. App. 13). See cases cited at Pet. App. 14; *United States* v. *Marcus*, 213 F. 2d 230 (C.A. 7), certiorari denied, 348 U.S. 824; *Williams* v. *United States*, 192 F. 2d 39 (C.A. 5). Here both the government and the court were scrupulous in avoiding any promise or indication as to what the sentence would be.[5]

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[5] The comment made to petitioner by Assistant United States Attorney Segrest—that "things look good"—could not have affected the voluntariness of petitioner's guilty plea, since the comment was made after the plea was accepted.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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